(2)

No. 02-30

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

TERRY L. STEWART,

Petitioner,

v.

ANTHONY MARSHALL SPEARS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39, Rules of the Supreme Court, Respondent, Anthony Marshall Spears, hereby moves for leave to proceed *in forma pauperis* in the above-captioned action.

Respondent is incarcerated under a sentence of death in the Arizona State Prison in Florence, Arizona, and he lacks sufficient funds to pay for fees and expenses. No affidavit is attached in as much as the United States district court appointed counsel for Respondent under 21 U.S.C. § 848 (q) (4) (B) and (q) (6) and (q) (8). *See Spears v. Stewart*, No. CIV-00-1051-PHX-SMM (D. Ariz. Jun. 6, 2000) (order of appointment of counsel and general

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procedures) (Attachment A). For this reason, Respondent asks that this Court grant this motion and allow him to proceed *in forma pauperis*.

Respectfully submitted this 7th day of August, 2002.

Fredric F. Kay
Federal Public Defender
*Dale A. Baich
Sylvia J. Lett
Michael L. Burke

By: Michael L. Burke
Counsel for Petitioner
*Counsel of Record

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ATTACHMENT A

FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

JUN 07 2000

PHOENIX, ARIZONA

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Anthony Marshall Spears, Petitioner, vs. Terry L. Stewart, et al., Respondents.	No. CV 00-1051-PHX-SMM **ORDER OF APPOINTMENT AND GENERAL PROCEDURES**

IT IS HEREBY ORDERED granting Petitioner's Motion for Appointment of Counsel and appointing Fredric F. Kay, Federal Public Defender, District of Arizona, as counsel for Petitioner in his federal habeas corpus proceeding. Appointment is made pursuant to 21 U.S.C. § 848(q)(4)(B) and (q)(6) and (q)(8). The Federal Public Defender is authorized to designate an Assistant Federal Public Defender to handle the case.

IT IS FURTHER ORDERED that the designated Assistant Federal Public Defender file a notice of appearance with the Court within 10 days from the entry of this Order.

IT IS FURTHER ORDERED granting Petitioner's application to proceed *in forma pauperis*. Petitioner shall file with the Court a

certificate documenting his prison account balance upon completion of the form by the Arizona Department of Corrections.

IT IS FURTHER ORDERED that the Arizona Attorney General file a notice of appearance with the Court within 10 days from the entry of this Order.

IT IS FURTHER ORDERED that Counsel should make every effort to obtain a complete copy of the record on appeal within thirty days of the date counsel is appointed. Although the Court does not usually assist directly in obtaining the record, counsel should report any delays to the Court so that the Court is fully aware of any obstacles encountered.

IT IS FURTHER ORDERED that the following procedure will generally govern the briefing and resolution of this habeas corpus proceeding:

1. Status Conference: A status conference will be held on July 10, 2000, at 1:00 p.m. in Courtroom # 4, at which time the parties should be prepared to discuss whether Petitioner has the entire state court record. If he does not, Petitioner should identify which parts of the record he needs and propose an expeditious manner of obtaining the missing portions. The parties should also be prepared to discuss any statute-of-limitations, or other issues, if any, which may affect the filing of the Amended Petition or efficient resolution of this matter. The Court will also address the procedure to be followed in this case which is outlined below.

2. Amended Petition: After the status conference is held, the Court will enter a scheduling order to govern the filing of the

Amended Petition in this case. Because Petitioner commenced this proceeding after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to his case. Lindh v. Murphy, 521 U.S. 320 (1997). Under 28 U.S.C. § 2244(d)(1), as amended by the AEDPA, an application for habeas corpus relief must be filed within one year "of the date on which the judgment became final by the conclusion of direct review."

The Amended Petition shall include all known claims of constitutional error or deprivation entitling Petitioner to habeas relief. See Rule 2(c), 28 U.S.C. foll. § 2254. Petitioner is advised that he may be presumed to have deliberately waived his right to complain of any constitutional error or deprivation not raised in the Amended Petition. See Rule 9(b), 28 U.S.C. foll. § 2254; see also McCleskey v. Zant, 499 U.S. 467, 498 (1991) (abuse of the writ doctrine bars review of claims that could have been raised in a previous habeas petition absent a showing of cause and prejudice or a fundamental miscarriage of justice). Petitioner is further advised that pursuant to 28 U.S.C. § 2244, he may not file a second or successive petition in this Court without prior authorization from the Ninth Circuit. Under § 2244(b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent upon Petitioner to raise all known claims in the Amended Petition.

The Amended Petition shall set forth, in a clear and concise fashion, the legal and factual basis for each ground for relief. The factual basis shall include full citations to the appropriate portions of the record. Additionally, Petitioner shall include in

the Amended Petition a "Statement of Exhaustion," specifically asserting when and where each ground for relief was raised in the state courts. See Boyd v. Thompson, 147 F.3d 1124, 1127 (9th Cir. 1998).

3. Procedural Status of Claims: Respondents shall thereafter file an Answer Re: Procedural Status of Claims, which addresses the procedural status of all claims raised in the Amended Petition, specifically identifying which claims, if any, Respondents contend are unexhausted or procedurally barred from review on the merits. Petitioner shall respond to the answer by filing a Traverse. The Traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing regarding cause and prejudice, or miscarriage of justice, shall be incorporated into Petitioner's Traverse. Respondents may file a Reply, if they wish. Finally, Petitioner may file a Sur-reply that shall be limited to arguments concerning cause and prejudice or a fundamental miscarriage of justice, should Respondents address those issues in a Reply. The Court intends this briefing on the procedural status of the claims to be the sole briefing on all issues of exhaustion and procedural default necessary for the Court to determine which claims will be reviewed on the merits.

4. Merits of Claims: After the procedural status of the claims raised in the Amended Petition is fully briefed, the Court will determine which claims will be reviewed on the merits. A

scheduling order will be issued that will set forth when Petitioner shall file a Memorandum of Law Re: Merits of Claims, when Respondents shall file a Response Re: Merits of Claims, and when Petitioner shall file a Reply. Requests for an evidentiary hearing shall be incorporated into Petitioner's Memorandum of Law. The Petition will then be in a posture for the Court to resolve the merits of the appropriate claims in this habeas corpus proceeding.

IT IS FURTHER ORDERED that, in addition to the requirement of Local Rule 1.9(f), the parties shall file with the Clerk of Court an additional copy of every pleading or other document filed from this date forward for use by the Capital Case Staff Attorney. The notation "Capital Case Staff Attorney Copy" shall be clearly marked on the first page of such copy.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of the Petition for Writ of Habeas Corpus, the Order Staying Execution, and this Order to Fredric F. Kay, Federal Public Defender.

IT IS FURTHER ORDERED that a copy of the Petition for Writ of Habeas Corpus and this Order be served by the Clerk of Court upon Respondents Terry Stewart, George Herman and Monica Beerling, Assistant Arizona Attorney General, by certified mail pursuant to Rule 4, Rules Governing Section 2254 Cases.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Petitioner Anthony Marshall Spears.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court,

1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 5 day of June, 2000.

Stephen M. McNamee
Chief United States District Judge

Copies to all counsel of record.

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Question Presented For Review

Capital Case

The United States Court of Appeals for the Ninth Circuit held that Arizona's admitted failure to comply with its mechanism for the appointment of state post-conviction counsel precluded the state from invoking the "opt-in" procedures of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in respondent's federal habeas corpus proceeding. Did the Ninth Circuit err in reaching this conclusion without first requiring respondent to demonstrate prejudice resulting from the delay in the appointment of his post-conviction counsel?

Parties

Terry L. Stewart, the Director of the Arizona Department of Corrections, is the petitioner. Anthony Marshall Spears, an Arizona death row inmate, is the respondent.

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The other issues discussed in the petition are not properly presented to this Court for review. Moreover, even if the issues were properly presented, they would not warrant a writ of certiorari. 14

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BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Opinions Below

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 24, 2001, and is reported as *Spears v. Stewart*, 267 F.3d 1026 (9th Cir. 2001). The Ninth Circuit issued an amended opinion and denied *en banc* review on March 20, 2002. The amended decision is reported as *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002). (Appendix ("A")-1.) The judgment of the United States District Court for the District of Arizona was entered on November 21, 2000, and is unreported. *Spears v. Stewart*, No. CV-00-1051-PHX-SMM (D. Ariz.). (A-38.)

Jurisdictional Statement

Petitioner cites to 28 U.S.C. § 1257(a) to invoke the jurisdiction of this Court. Petition ("Pet.") at 1. That provision, however, does not confer jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit. Rather, 28 U.S.C. § 1254(1) gives this Court jurisdiction to review the decision below.

Constitutional and Statutory Provisions Invoked

Federal Statutory Provisions

28 U.S.C. § 2263(a)

> (a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

Fed. R. App. P. 2

> On its own or a party's motion, a court of appeals may--to expedite its decision or for other good cause--suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Sup. Ct. R. 10

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another

United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 14(1)(a)

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any

question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

State Statutory Provisions

Ariz. R. Crim. P. 31.20

In exceptional circumstances, the Appellate Court, on motion of a party or on its own initiative, may suspend the requirements of any section of Rule 31, and may substitute any other appropriate order of proceedings.

COMMENT

This provision is comparable to Ariz.SupCt.R. 26 and Federal Rules of Appellate Procedure 2. Suspension is limited to exceptional circumstances rather than a showing of good cause. The rule's primary purpose is to allow the appellate court to expedite cases of special concern to the public or to the parties and to permit extensions of the page limits for briefs and memoranda in exceptional cases.

Ariz. R. Crim. P. 31.23(b)(1)

In capital cases, on the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal, the clerk of the supreme court expeditiously shall file a notice of post-conviction relief in the trial court.

The supreme court shall appoint counsel pursuant to section 13-4041, subsection B. All indigent state prisoners under a capital sentence are entitled to the appointment of counsel to represent them in state post-conviction proceedings.

Ariz. R. Crim. P. 32.4(c) (1998)

Upon the filing of a timely notice in a capital case, in a non-capital case, or the second or subsequent notice in a non-capital

> case which for the first time raises a claim of ineffective assistance of counsel, the presiding judge shall appoint counsel within 15 days if requested and the defendant is determined to be indigent.

Statement of the Case

In its amended opinion in this case, the United States Court of Appeals for the Ninth Circuit held that the Arizona statutes and rules governing the appointment and compensation of counsel for indigent capital defendants in state post-conviction proceedings facially satisfied the "opt-in" requirements of Chapter 154 of the AEDPA. *Spears,* 283 F.3d at 1018. (A-36.) The panel, however, refused to afford Arizona the benefits of opt-in status in this particular case because it found that the state failed to comply with its own procedures for the timely appointment of counsel. *Id.* at 1019. (A-37.) As the appellate court noted, timeliness is a requirement that lies "at the heart of the post-conviction procedure." *Id.* (A-37.) Specifically, the panel found that, by waiting one year and eight months to provide respondent a post-conviction attorney, the state "failed utterly" to satisfy its obligation under the AEDPA to timely appoint counsel. *Id.* (A-37.)

Petitioner seeks review of that portion of the Ninth Circuit's amended opinion that precludes Arizona from imposing the expedited procedures of Chapter 154 in this particular case. Petitioner states the issue as follows:

> Given that Spears never alleged or proved prejudice resulting from the delay in appointment, did the Ninth Circuit err in concluding that Arizona should be denied the *quid pro quo* benefits promised by Congress and precluded from enforcing the provisions in Chapter 154?

Pet. at i.

As petitioner's statement of the issue indicates, he is asking this Court to review a very narrow aspect of the Ninth Circuit's ruling. Specifically, he requests that the Court address whether Arizona's failure to comply with the appointment provisions of its opt-in mechanism automatically precluded it from realizing the benefits of opt-in status, or whether the court should have required respondent to demonstrate prejudice resulting from the state's non-compliance before barring it from invoking the provisions of Chapter 154 in this case. According to petitioner, "[t]he Ninth Circuit discerned a congressional intent that states only benefit from Chapter 154 if the appointment of PCR [post-conviction review] counsel to indigent capital defendants awaiting state collateral review is immediate, without any inquiry into whether prejudice results from a delayed appointment." Pet. at 12. He has petitioned this Court for a writ of certiorari for the sole purpose of "[s]ettling the question of congressional intent on this point." *Id.*

Respondent Anthony Marshall Spears ("Spears") respectfully submits that, for the reasons outlined below, the issue raised by the petition does not warrant the granting of a writ of certiorari. He therefore requests that the Court deny the petition.

Reasons for Denying the Petition

The precise nature of petitioner's argument is difficult to discern from his petition. Nothing in the "Question Presented for Review" suggests that petitioner is challenging the Ninth Circuit's conclusion that Arizona failed to comply with its opt-in mechanism when it

did not appoint post-conviction counsel for respondent in a timely manner. Nor does the question presented challenge the Ninth Circuit's holding that the AEDPA requires expeditious appointment of post-conviction counsel. Rather, the question, as presented by petitioner, identifies the issue as being whether the Ninth Circuit erred in failing to consider whether Spears was prejudiced by Arizona's delay in appointing post-conviction counsel. Pet. at i, 15.

Petitioner, however, devotes much of the substantive portion of the petition to arguing two issues not raised in his "Questions Presented for Review." Specifically, he claims that the Ninth Circuit erred in holding that the 20-month delay in appointing post-conviction counsel for Spears violated Arizona's opt-in procedures, Pet. at 15- 17, and that the AEDPA requires that states expeditiously appoint post-conviction counsel. Pet. at 18-21.

Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." A petitioner does not bring an issue before the Court merely by discussing it in the text of his petition for certiorari. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (*citing Mazer v. Stein*, 347 U.S. 201, 206 n.5). "Rule 14.1(a) requires that a subsidiary question be fairly included in the *questions presented* for [the Court's] review." *Id.* (emphasis in original).

Accordingly, the sole issue petitioner properly presents to the Court is whether Arizona's failure to comply with its own mechanism for the appointment of post-conviction

counsel can prevent the state from enforcing the opt-in provisions of Chapter 154, absent a showing that Spears was prejudiced by the state's non-compliance. This narrow and comparatively unimportant question does not merit the granting of a writ of certiorari.

I.

Petitioner presents no compelling reason for this Court to grant his petition.

"A petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Because no compelling reason exists for granting a writ of certiorari on the issue presented, the Court should deny the petition. First, before the Ninth Circuit ever issued its opinion in this case, Arizona had amended the procedural rules of its opt-in "mechanism" several times, substantively altering it from the procedure at issue here. As a result, the Ninth Circuit's ruling, whether correct or incorrect, effects comparatively few capital defendants. Second, even if the opt-in procedures discussed in this case were still in effect, the substantive question petitioner presents simply does not constitute a significant question of national importance.

A. Arizona abandoned the appointment-of-counsel provision at issue in this case long before the Ninth Circuit issued its opinion.

Petitioner is asking this Court to issue an opinion concerning the particulars of an opt-in procedure that no longer exists. As petitioner acknowledges, the appointment-of-counsel rule considered by the Ninth Circuit in this case applied only to those capital defendants whose direct appeals became final prior to December 1, 2000. Pet. at 15. After that date,

Arizona abandoned the requirement that counsel be appointed within fifteen days of the filing of the notice of post-conviction relief.[1]

Given that the appointment procedure at issue in this case applied only to those approximately thirty Arizona capital defendants who received post-conviction counsel while the procedure was in affect, this Court does not have a compelling reason to resolve the question presented by petitioner. *See, e.g., Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 499 (1971) (Harlan, J., concurring) ("The fact that the statute has been repealed since certiorari was granted and that less than 10 persons would be affected were we to accept petitioners' legal position renders this case . . . a classic instance of a situation where the exercise of our powers of review would be of no significant continuing national import."). For this reason alone, the Court should deny petitioner's request for a writ of certiorari.

B. The substantive question petitioner presents does not constitute a significant question of national importance.

Petitioner maintains that the question he presents is an "important question of law," the resolution of which "is critical to the 37 states that have the death penalty, the vast majority of which are attempting to opt in to Chapter 154." Pet. at 12-13. Federal cases addressing the opt-in issue, however, belie this claim.

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[1]As petitioner concedes, the rule was in fact "amended several times." Pet. at 5. In none of its subsequent incarnations, however, did the rule expressly provide for the timely appointment of counsel.

Petitioner asserts that "the Ninth Circuit acted in defiance of clear Congressional intent" when it failed to consider whether a state's failure to comply with its opt-in mechanism should prevent the state from receiving the benefits of opt-in status only when the indigent capital defendant demonstrates that he was prejudiced by the state's non-compliance. Pet. at 13. However, after accusing the Ninth Circuit of "defiance" in the face of "clear Congressional intent," petitioner fails to offer this Court a single shred of support for his remarkable claim.

A careful review of the petition for writ of certiorari reveals that petitioner provides no explanation whatsoever concerning Congress's intent on the prejudice issue. Petitioner instead discusses at length his view of Congressional intent concerning "the timing of the appointment of post-conviction relief counsel." Pet. at 18-21. He argues that "Congress could not have intended that a State only benefit from Chapter 154 if the appointment of post-conviction counsel is immediate." *Id.* at 20. Regardless of whether petitioner is correct or incorrect in this conclusion (and Spears maintains that he is incorrect), the validity of the Ninth Circuit's ruling on the immediacy issue is not a question presented by the petition. *See* Pet. at i. Petitioner's sole challenge to the Ninth Circuit's ruling is the appellate court's failure to require that respondent demonstrate that he was prejudiced by Arizona's failure to appoint his post-conviction counsel in a timely manner. *Id.* On this issue, petitioner provides the Court with no analysis, save his opinion that a prejudice requirement would be the "most sensible standard." *Id.* at 21.

Petitioner's only discussion of the prejudice standard appears at the end of the petition in two brief paragraphs that are devoid of any evidence of the purported "clear Congressional intent" upon which petitioner relies. Pet. at 21-22. Rather, citing two decisions, petitioner claims that "[o]ther federal cases that have addressed Chapter 154 require either actual prejudice that the defendant demonstrates or inherent prejudice that results from undue delay." *Id.* at 21.

It is telling that petitioner is able to direct this Court to only two other federal cases that, in his opinion, address the prejudice issue. If the matter is as critical as petitioner maintains, *see* Pet. at 12, one would expect it to have been addressed in more than two cases. Even more telling, however, is the fact that, in truth, the two cases petitioner cites do not discuss the prejudice issue at all. Petitioner relies on *Hill v. Butterworth*, 941 F. Supp. 1129 (N.D. Fla. 1996), *vacated on other grounds,* 147 F.3d 1333 (11th Cir. 1998), and *Ashmus v. Calderon ("Ashmus II")*, 123 F.3d 1199, 1208 (9th Cir. 1997), *rev'd on other grounds,* 523 U.S. 740 (1998), *and vacated*, 148 F.3d 1179 (9th Cir. 1998). Neither case, however, even slightly supports petitioner's burden-shifting argument that a capital defendant has the burden of proving prejudice resulting from the state's failure to comply with the timeliness requirements of Chapter 154.

In *Hill*, the district court addressed the plaintiff-inmate's request for a preliminary injunction enjoining the State of Florida from alleging that it had complied with Chapter 154's opt-in requirements. 941 F. Supp. at 1132. In granting the preliminary injunction, the

district court held, among other things, that Chapter 154 requires that "counsel must be immediately appointed after a capital defendant accepts the state's offer of post-conviction counsel." *Id.* at 1147. Because Florida, like Arizona, had failed to fulfill this obligation in numerous cases, the court held that Florida had not "made the requisite meaningful offer of counsel" and therefore did not "qualify as an 'opt-in' state." *Id.*

In rejecting Florida's claim to opt-in status, the district court did not consider whether the plaintiff was prejudiced by the state's delay. *See* 941 F. Supp. at 1144-47. In deciding whether to grant the preliminary injunction, the court did consider whether the plaintiff had made a showing of a substantial threat of irreparable harm. *Id.* at 1147-48. This traditional preliminary injunction determination, however, was distinct from the court's opt-in analysis. The court had already decided that Florida could not claim opt-in status; it considered irreparable harm only when deciding whether to issue a preliminary injunction. *Id.*

Accordingly, *Hill* provides no support for petitioner's stance. If anything, the decision refutes petitioner's argument. In rejecting Florida's claim to opt-in status, the district court emphasized that it was not "unsympathetic" to the state's position, noting that although thirteen years had passed since Hill's conviction, he was "still litigating his appeals in federal court" and was "a paradigm example of the system's many flaws." 941 F. Supp. at 1148-49. This factor, however, bore no weight in the court's determination that Florida could not claim opt-in status.

Ashmus II is similarly unavailing to petitioner's claim. Petitioner describes *Ashmus*

II as a case in which "prejudice inherent in undue delay was shown." Pet. at 22. Assuming that a party could somehow demonstrate *inherent* prejudice, nothing in *Ashmus II* suggests that delay in appointment of post-conviction counsel will preclude opt-in status only when the defendant demonstrates prejudice. The Ninth Circuit's discussion of the appointment delay in *Ashmus II* follows in its entirety. The court's ruling simply does not support petitioner's claim:

> Finally, the district court correctly determined that California's failure to actually appoint counsel after an indigent prisoner has said he or she will accept counsel precludes California from qualifying under Chapter 154. Chapter 154 requires a state to enter an order appointing counsel "upon a finding that the prisoner is indigent and accepted the offer [of counsel] or is unable competently to decide whether to accept or reject the offer. . . ." 28 U.S.C. § 2261(c)(1), 2265(b). The plaintiff class presented evidence that counsel often is not appointed until years after a prisoner accepts the offer of counsel. California may not take advantage of the six-month limitations period when it takes years to appoint counsel.

123 F.3d at 1208. (brackets in original.)

Petitioner has failed to present a compelling reason for this Court to grant a writ of certiorari in this case. Rather, he asks this Court to address an obscure issue that has never been directly addressed by any federal court. The "critical" issue petitioner asks this Court to resolve is, in truth, merely a chimera. The question presented does not merit a writ of certiorari, and respondent therefore requests that the Court deny the petition.

II.

The other issues discussed in the petition are not properly presented to this Court for review. Moreover, even if the issues were properly presented, they would not warrant a writ of certiorari.

Petitioner appears to argue two additional issues in the body of the petition. First, he suggests that the delay in appointing Spears' post-conviction counsel did not contravene Arizona's rules for the timely appointment of such counsel. Second, he suggests that, even if Arizona did violate its own procedural rules in this case, Chapter 154 does not require a state to appoint post-conviction counsel in an expeditious manner for it to qualify for opt-in status. Because petitioner fails to properly raise either issue in the "Question Presented for Review," the Court should not consider these arguments in deciding whether to grant the writ of certiorari. *See Izumi Seimitsu Kogyo Kabushiki Kaisha*, 510 U.S. at 31 n.5. Further, even if the issues were properly presented in the petition, neither would merit the granting of a writ of certiorari.

A. Petitioner argues that the twenty-month delay in appointing Spears post-conviction relief counsel "was within the scope of state law." This Court, however, does not resolve questions of purely state law. Moreover, petitioner's argument is factually and legally unsound.

The Ninth Circuit found that Arizona's procedural rules provide for the expeditious appointment of post-conviction counsel. *See Spears*, 283 F.3d at 1018. (A-35.) This finding was critical to the appellate court's ultimate conclusion that the state facially complied with the dictates of Chapter 154. *Id.* (A-36.) As the Ninth Circuit explained in its opinion, at the

time Spears' appeal became final, Arizona's rule required that post-conviction counsel be appointed within fifteen days of either the Supreme Court's denial of certiorari or the expiration of the ninety-day period for filing a certiorari petition. *See id.* (A-36.) The panel correctly concluded that, in Spears' case, the state failed to appoint counsel within the required fifteen days. Indeed, it failed to appoint post-conviction counsel for over one year and eight months. Petitioner concedes this fact. Pet. at 8. Incredibly, however, he nevertheless suggests in the petition that the delay in appointing counsel for respondent was perfectly acceptable under Arizona's procedural rules, and should not prevent the state from receiving the benefits of opt-in status in Spears' case. Petitioner's argument rests solely on a principle of state law.

Rule 31 of the Arizona Rules of Criminal Procedure is comprised of twenty-six subsets of rules. Petitioner's argument concerns two of those rules: 31.20 and 31.23(b)(1). Rule 31.20 permits the state supreme court to suspend its rules in "exceptional circumstances." Rule 31.23(b)(1) prescribes the procedure the Arizona Supreme Court must follow in issuing a mandate in a capital case. That rule provides:

> The clerk of the Supreme Court shall issue the mandate in capital cases when . . . in a case in which a petition for certiorari has actually been filed, when the clerk of the Supreme Court is notified by the United States Supreme Court that the petition has been denied.

Ariz. R. Crim. P. 31.23(b)(1) (1996).

Petitioner asserts that, in Spears' case, the Arizona Supreme Court invoked Rule 31.20

to suspend its obligation under Rule 31.23(b)(1) to issue the mandate once this Court denied respondent's petition for writ of certiorari on direct appeal. Pet. at 8. Thus, according to petitioner, the state supreme court's failure to issue the mandate, and its corresponding failure to appoint post-conviction counsel, was nothing more than a "substituted procedure" fully sanctioned by Arizona's rules. *Id.* at 17. Not only is this argument both factually and legally incorrect, it is rests solely on a question of state law, and is thus not an appropriate matter for this Court's resolution.

1. Petitioner is asking this Court to interpret a rule of state criminal procedure.

Petitioner argues that the Arizona Supreme Court acted within its authority under Rule 31.20 of the Arizona Rules of Criminal Procedure to suspend its self-imposed obligation to issue the mandate in Spears' direct appeal as soon as it was notified that this Court had denied certiorari. Apparently, petitioner is asking the Court to validate this argument. Such a request, however, is not an appropriate basis for granting a writ of certiorari.

This Court has "no authority to review state determinations of purely state law." *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986) (citing *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); and *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). Whether the Arizona Supreme Court acted in conformity with its own procedural rules in withholding the mandate in Spears' direct appeal is a question purely of state law. Accordingly, even if petitioner had properly presented the issue to the Court, it would not

merit a writ of certiorari.

2. Even if this Court could properly exercise its certiorari authority to resolve a question purely of state law, petitioner's argument is factually and legally unsound.

The Arizona Supreme Court affirmed Spears' conviction and death sentence in January, 1996. *See Spears*, 184 Ariz. 277, 908 P.2d 1062. This Court denied Spears' subsequent petition for certiorari on November 4, 1996, *see Spears v. Arizona*, 519 U.S. 967 (1996). Pursuant to Rule 31.23(b)(1) of the Arizona Rules of Criminal Procedure, the Arizona Supreme Court was then required to issue its mandate in Spears' case. The court, however, took no action.

Petitioner now claims, without support, that the Arizona Supreme Court was simply invoking Rule 31.20 when it withheld the mandate. (Pet. at 8.) The state supreme court issued the mandate in respondent's case on July 17, 1998, one year and eight months after the required date under Rule 31.23(b)(1). The delayed mandate, however, made no reference to the court's authority under Rule 31.20 to suspend its procedural rules in "exceptional circumstances."

Thus, as a factual matter, the record in this case simply does not support petitioner's claim that the Arizona Supreme Court invoked Rule 31.20 to excuse its failure to timely issue the mandate and appoint post-conviction counsel in Spears' case. Moreover, even a cursory review of Rule 31.20 reveals *why* the court would not have invoked that rule to explain away its inability to comply with Arizona's statutes and rules governing the timely appointment

of post-conviction counsel.

Rule 31.20 permits an appellate court, in exceptional circumstances, to suspend the procedural rules governing appeals in criminal cases and to substitute any other appropriate order of proceedings. "The rule's primary purpose is to allow the appellate court to expedite cases of special concern to the public or to the parties and to permit extensions of the page limits for briefs and memoranda in exceptional cases." Official Comment, Rule 31.20. In that regard, Rule 31.20 is comparable to Rule 2 of the Federal Rules of Appellate Procedure. *See id.; see also State v. Herber*, 121 Ariz. 374, 376, 599 P.2d 913, 915 (1979) (equating Rule 31.20 with Fed. R. App. P. 2). Like its federal counterpart, Rule 31.20 "recognizes that there may be extraordinary situations, involving either the public interest or the concerns of expeditious judicial administration, where it becomes inappropriate to follow the sometimes-leisurely pace established by the Rules for filing a printed record or appendix, for preparing and filing printed briefs, or for holding oral argument." 16A Charles Alan Wright & Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3948, at 25 (3d ed. 1999); *see Herber*, 121 Ariz. at 376, 590 P.2d at 915. In other words, Rule 31.20 is intended to act as a sword to expedite the judicial process, not as a shield to protect the court from complying with its own rules.

Nothing in either the language or history of Rule 31.20 provides the slightest support for petitioner's claim that, when the Arizona Supreme Court withheld the mandate in this case because it was unable to find qualified counsel to represent Spears in his post-conviction

relief proceedings, it was acting under the auspices of Rule 31.20. Although a state appellate court has *inherent* authority to withhold or recall a mandate when the interests of justice require, the extraordinary circumstances justifying the exercise of that authority are far different from the procedural uses for which Rule 31.20 was intended.[2] *Lindus v. Northern Ins. Co. of New York*, 103 Ariz. 160, 161, 438 P.2d 311, 312 (1968).

The Arizona Supreme Court was forced to exercise its inherent authority to withhold the mandate in this case because, by the time Spears' appeal became final in November 1996, Arizona's system of post-conviction review in capital cases had been rendered inoperable by the state's grossly inadequate "mechanism" for the appointment and compensation of post-conviction counsel. Ahead of Spears stood numerous other death row inmates awaiting appointment of post-conviction counsel. Because the Arizona Supreme Court was unable to find a single, qualified attorney who was willing to accept a capital case under the unworkable strictures of Arizona's appointment mechanism, it was faced with a dilemma that threatened to undermine the integrity of the judicial process. Presented with no other alternative, the state supreme court was forced to violate its own procedural rules and withhold the mandates in several death penalty cases until the system for appointment and

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[2]A comparison with the federal rules provides guidance on this point. Rule 2 of the Federal Rules of Appellate Procedure is the federal counterpart to Rule 31.20. Rule 2 does not address an appellate court's authority to withhold or recall a mandate. Indeed, no federal rule or statute does. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-29 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990). Rather, that authority derives from an appellate court's inherent powers and is exercised only to prevent injustice or to protect the integrity of the judicial process. *Id.; see also Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998).

compensation of post-conviction counsel could be revamped.

Petitioner now attempts to portray the Arizona Supreme Court's decision to withhold the mandates in those cases as nothing more than a procedural trifle. Claiming that a defendant's criminal appeal does not become "final" until the appellate court issues the mandate, petitioner cavalierly argues that, so long as the court is free to withhold the mandate as a matter of course, "there will never be a significant amount of statutory period that elapses while a defendant is waiting the appointment of PCR counsel," Pet. at 20, and the state will thus always be in compliance with its obligation to appoint post-conviction counsel in a timely fashion. This distorted view of the judicial process, however, bears no resemblance to the "*quid pro quo*" Congress envisioned when it enacted the AEDPA.

The Ninth Circuit correctly concluded that the state "failed utterly" to appoint counsel for Spears in a timely manner. *Spears*, 283 F.3d at 1019. (A-37.) To support his claim that the one-year-and-eight-month delay in this case was in fact a "timely" appointment of counsel, petitioner offers a tortured, self-serving interpretation of Arizona's rules of criminal procedure that finds no support in either the language of the rules, or the cases interpreting them. Accordingly, even if the question had been properly presented to the Court in the petition and was within this Court's jurisdiction to review, it would not warrant the granting of a writ of certiorari.

B. Petitioner's argument that Chapter 154 does not require states expeditiously to appoint post-conviction counsel is premised on his misconception about the obligations of opt-in status and is without any support in the language, legislative history or case law interpreting the AEDPA.

Petitioner also suggests in the petition that, even if the lengthy delay in appointing post-conviction counsel for Spears violated Arizona's procedural rules, that delay should not prevent the state from claiming opt-in status in Spears' case because nothing in either the language or legislative history of Chapter 154 of the AEDPA requires timely appointment of post-conviction counsel. Pet. at 18-21. This is plainly wrong, and the court of appeals correctly found so.

Pursuant to Chapter 154, a capital defendant in an opt-in state must file his or her federal habeas petition "not later than 180 days after final State court affirmance of the conviction and sentence on direct review." 28 U.S.C. § 2263(a). The statute tolls this 180-day period only for (1) a pending petition for certiorari in the United States Supreme Court, (2) a pending state post-conviction proceeding, and (3) an additional thirty-day period upon a showing of good cause. *Id.* "Significantly, the statute does not provide for the period to be tolled during the time a petitioner is awaiting appointment of counsel." *Spears*, 283 F.3d at 1017. (A-34.) The 180-day period constitutes the entire time allotted to both state post-conviction counsel *and* federal habeas counsel to investigate, prepare and file their respective post-conviction pleadings. As the Ninth Circuit correctly observed, the fact that post-conviction counsel are afforded so little time to perform these responsibilities is, standing

alone, sufficient evidence that Congress intended that opt-in states appoint post-conviction counsel in an expeditious manner. *Id.* (A-34.)

Chapter 154 expressly provides that "[a]ny mechanism for the appointment, compensation, and reimbursement of counsel . . . must offer counsel to all State prisoners under capital sentence," and dictates that a court appoint "one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer." 28 U.S.C.A. § 2261(c). In light of the 180-day time limits of Chapter 154, for these provisions to have any meaning, appointment of post-conviction counsel must occur expeditiously. *See, e.g., Ashmus II*, 123 F.3d at 1208 ("California may not take advantage of the six-month limitations period when it takes years to appoint counsel."); *Hill*, 941 F. Supp. at 1145-47 (holding that Chapter 154 requires appointment of counsel immediately upon conclusion of state proceedings on direct appeal).

Petitioner's assertion that Chapter 154 does not require expeditious appointment of post-conviction counsel reveals a profound misconception about a state's obligations under the *quid pro quo* requirements of opt-in status. In proffering this argument, petitioner once again relies on his erroneous belief that the Arizona Supreme Court may freely invoke Rule 31.20 to withhold the mandate in every capital case until it has located post-conviction counsel. Clouded by this belief, petitioner reasons that because the state can always refuse to issue the mandate until it has located post-conviction counsel, counsel could never be appointed in an untimely manner. *See* Pet. at 20 ("Thus, there will never be significant lapses

of time while a defendant is awaiting the appointment of PCR counsel."). Completing the flawed syllogism, petitioner concludes that Congress could not have intended that Chapter 154 require "expeditious" appointment of counsel.

As Spears has demonstrated, however, petitioner's analysis only works if you accept his indefensible premise that a state's only requirement under Chapter 154 is that it have some "mechanism" for the appointment of post-conviction counsel, regardless of how freely the state may manipulate that mechanism to assure that it is always technically, rather than meaningfully, in compliance with its obligation to appoint post-conviction counsel on a "timely" basis. By advancing this argument, petitioner mocks Congress's clear intent that an opt-in state's appointment mechanism "be put down in a concrete fashion where it can be seen and relied upon, rather than be something which is subject to the vagaries of differing interpretations of what is done in practice." *Satcher v. Netherland*, 944 F. Supp 1222, 1244 (E. D. Va. 1996), *aff'd in part, rev'd. in part on other grounds*, *Satcher v. Pruitt*, 126 F.3d 561 (4th Cir. 1997).

Petitioner is plainly wrong when he asserts that Chapter 154 does not require the expeditious appointment of post-conviction counsel. Accordingly, even if the question had been properly presented to the Court in the petition, it would not warrant the granting of a writ of certiorari.

Conclusion

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 7th day of August, 2002.

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